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No. 03-1392

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IN THE

Supreme Court of the United States

ALPHONSO STRIPLING,
Petitioner,

v.

FREDRICK HEAD, Warden,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF THE ARC OF THE UNITED STATES, THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE ARC OF GEORGIA, AND THE GEORGIA ADVOCACY OFFICE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, The Arc of the United States, *et al.*, move the Court for leave to file a Brief *Amici Curiae* in support of the petition in the above-entitled case. Counsel for Petitioner has granted his consent to the filing of this brief. Counsel for Respondent, however, has notified counsel for *amici* that Respondent does not consent.

Amici include national and state professional and voluntary associations concerned with criminal proceedings affecting people with mental disabilities. *Amici* thus have expertise concerning criminal defendants with mental disabilities and the impediments to fair judicial processes which will result if those defendants are required to prove their mental retardation beyond a reasonable doubt.

Amici wish to offer the Court relevant information on the historical development of the beyond a reasonable doubt standard, and why it cannot be applied to a defendant's effort to invoke the constitutional protection of *Atkins v. Virginia*, 536 U.S. 304 (2002). *Amici* also wish to present information on contemporary practices and standards when the State imposes a burden of persuasion on defendants with mental retardation who may face execution.

Amici believe that the Georgia statute, providing that criminal defendants must prove their mental retardation beyond a reasonable doubt to invoke the protections of *Atkins*, impermissibly obstructs the fair adjudication of such constitutional claims.

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying brief in the present case in support of the petition for certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Whether, under the Due Process Clause, a defendant seeking to avoid execution pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), may be required to prove his or her mental retardation beyond a reasonable doubt.

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INTEREST OF *AMICI* [1]

Amici are national and Georgia disability organizations with a longstanding concern about the prospect that defendants with mental retardation might be executed.

[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

The American Association on Mental Retardation (AAMR), founded in 1876, is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation.

The Judge David L. Bazelon Center for Mental Health Law (Bazelon) is a national public interest organization founded in 1972 to advocate for the rights of children and adults with mental disabilities.

The Arc of Georgia is an affiliated state chapter of The Arc of the United States. In 1987 and 1988, The Arc of Georgia was the principal advocate for legislation prohibiting the execution of individuals with mental retardation in Georgia.

The Georgia Advocacy Office (GAO) is the protection and advocacy system for individuals with disabilities, designated by the Governor of the State of Georgia pursuant to federal statute and regulations. GAO is authorized to advocate for and protect the rights of individuals, monitor conditions, and investigate potential incidents of abuse and neglect in private or public facilities and in the community.

The Arc of the United States, AAMR, and Bazelon have appeared as *amici curiae* on the merits in almost all of the cases in which this Court has addressed issues involving mental retardation over the last three decades, including *Atkins* and, in the current Term, *Tennard v. Dretke* (No. 02-10036). These organizations do not regularly file briefs either supporting or opposing petitions for writs of certiorari. But based on their members' experience in the adjudication of

Atkins cases in Georgia, as well as in other States, and because of the unusual importance of this issue, *amici* depart from their ordinary practice and urge this Court to grant the petition.

Disability organizations, including *amici* and their chapters in numerous States, have been actively involved in helping state governments define mental retardation and devise procedures to implement *Atkins*. In each State with the death penalty, disability advocates have been providing assistance to legislatures in crafting the rules and standards under which mental retardation issues will be adjudicated. In States in which the legislatures have not yet acted, disability organizations have participated, as *amici*, in the processes by which state courts have fashioned judicial remedies. This effort by disability organizations and advocates directly parallels the role that such groups played in enacting legislation on mental retardation and the death penalty in those States (including Georgia) that acted prior to this Court's decision in *Atkins*.[2]

State legislatures and courts have looked to disability organizations for assistance not only because of their expertise on the nature of mental retardation, but also because clinicians and professionals from these organizations will be called upon to provide the individual evaluations and testimony that will assist in the adjudication of individual cases. Legislators and judges in the States have been eager to ensure that the terminology and procedures adopted would facilitate the work of these professionals in assisting trial courts in implementing *Atkins*.

The interest of the disability organizations in these efforts on the state level is the same basic interest that drew them into their role in this Court's consideration of cases like *Penry*

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[2] *See generally* James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from Penry to Atkins*, 33 N.M. L. REV. 173, 176-77 (2003).

v. Lynaugh, 492 U.S. 302 (1989), and *Atkins*, and now brings them to support the petition in this case: assuring the fair and dispassionate consideration of clinical information in the cases of capital defendants who may have mental retardation. This fundamental concern for fairness in these cases leads *amici* to a more particularized concern: that no defendants who offer evidence indicating mental retardation should be confronted with unfair procedural obstacles that would prevent the even-handed evaluation of their Eighth Amendment claims.

SUMMARY OF THE ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that defendants who have mental retardation are protected from execution by the Eighth Amendment. It then entrusted to the States the initial task of developing "appropriate procedures" for the protection of this constitutional right. *Id.* at 317. While the vast majority of the procedures adopted by the various States are consistent with fair adjudication of *Atkins* claims, Georgia's requirement that defendants prove their own mental retardation *beyond a reasonable doubt* violates the fundamental principles of due process.[3]

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[3] Petitioner presents cogent arguments on both (1) the Georgia Supreme Court's clearly erroneous interpretation of this Court's opinions, and (2) the inconsistency of the Georgia court's reasoning with that of the courts of other States regarding the burden of persuasion, particularly in those States adopting the standard of clear and convincing evidence. In this brief, *amici* will only address the precise issue posed by the Question Presented, *i.e.*, the placement of the burden on defendants at *beyond a reasonable doubt*. Were the Court to grant the petition, it could, of course, clarify its intention to address only the constitutionality of the Georgia burden, and not broader questions which might arise in those States that employ a test of clear and convincing evidence. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

As this Court's use of the term "appropriate" signifies, the procedures that States adopt to implement *Atkins* must satisfy the requirements of the Due Process Clause. Georgia's requirement that capital defendants prove their own mental retardation beyond a reasonable doubt cannot be reconciled with the central tenets of due process.

The reasonable doubt standard historically has been reserved for the State's burden of proof in criminal trials. Imposing so heavy a burden on *capital defendants* seeking the protection of a recognized constitutional right is unprecedented. No other State employs this test in mental retardation cases, and there are few instances, if any, in which a State imposes this burden on defendants with regard to any issue.

This Court's Due Process Clause cases are consistent with the history of the reasonable doubt test and with the pattern of contemporary practice. The reasonable doubt burden creates a constitutionally unacceptable risk that defendants with mental retardation will be executed, and the State has offered no countervailing interest sufficient to justify that risk.

ARGUMENT

I. SINCE THE *ATKINS* DECISION TRANSFORMED PROTECTION OF DEFENDANTS WITH MENTAL RETARDATION INTO A CONSTITUTIONAL RIGHT, STATES MUST NOW IMPLEMENT THAT RIGHT IN ACCORDANCE WITH DUE PROCESS.

In *Atkins*, this Court recognized that the execution of any individual who has mental retardation would violate the Punishments Clause of the Eighth Amendment. As with the issue of competence to face execution, the Court entrusted to the States, in the first instance, "the task of developing *appropriate* ways to enforce the *constitutional* restriction" on this category of executions. 536 U.S. at 317 (emphasis added).

In response to this directive, most States with laws that provide for the death penalty have enacted a statutory definition of mental retardation and procedures for the adjudication of cases, or have had such procedures prescribed by their State's highest court. And while these laws differ from one another in several respects, the vast majority of the issues have been addressed in a thoughtful and even-handed fashion,[4] and thus do not raise constitutional concerns.

Georgia's decision, however, requiring capital defendants to prove that they have mental retardation at the reasonable doubt standard involves constitutional concerns of the highest magnitude.

A. This Court's Decision in *Atkins* Recognizes a Fundamental Constitutional Right.

Atkins clearly establishes that defendants who have mental retardation cannot, consistent with the Eighth Amendment, be sentenced to death. The Court based its holding both on a growing body of evidence of a national consensus against such executions and upon its own "independent evaluation of the issue." 536 U.S. at 321. The opinion concluded that "such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* (internal quotation omitted).

By recognizing this Eighth Amendment right, the Court transformed what had been an optional policy choice within the discretion of the States into a constitutional mandate. Prior to *Atkins*, States were free to offer statutory protection to capital defendants with mental retardation (as eighteen States had already done), or not. This Court's decision funda-

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[4] *See generally* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY LAW REPORTER 11 (2003) (hereinafter "*Legislative Guide*").

mentally altered that situation. Obviously, for States that had previously permitted the execution of individuals with mental retardation, it was made clear that they can no longer do so. But it is equally clear that, for those States whose legislatures had already chosen not to execute such individuals, the recognition that this discretionary choice is now a constitutional command means they must adjudicate claims of mental retardation in accordance with the Due Process Clause of the Fourteenth Amendment.[5]

B. Due Process Requires that Constitutional Rights Be Administered Consistent with Principles of Fundamental Fairness.

While this Court has observed that due process is generally a flexible concept that does not apply uniformly "to every imaginable situation," *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961), the States do not have unreviewable discretion in limiting individuals' access to constitutionally protected rights. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) ("The right to due process is conferred, not by legislative grace, but by constitutional guarantee.") (internal citation omitted). And "because the States have considerable expertise . . . grounded in centuries of common law tradition," the Court has exercised "substantial deference to legislative judgments" in the area of criminal procedure. *Medina v. California*, 505 U.S. 437, 445-46 (1992). This deference, however, has not been limitless. *See, e.g., Cooper v. Okla-*

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[5] And as this Court has observed, since "the minimum requirements" of procedural due process are a matter of federal law, "they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. Moreover, the degree of proof required in a particular type of proceeding is the kind of question which has traditionally been left to the judiciary to resolve." *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982) (internal citations and quotations omitted).

homa, 517 U.S. 348 (1996). And it certainly is not an invitation to the States to employ procedures that will have the effect of rendering recognized *substantive* constitutional rights inaccessible to defendants who are entitled to their protection.[6]

II. DUE PROCESS PROHIBITS GEORGIA FROM REQUIRING CAPITAL DEFENDANTS TO PROVE THEIR OWN MENTAL RETARDATION BEYOND A REASONABLE DOUBT.

A. There Are No Historical Precedents for Requiring Capital Defendants to Prove, Beyond a Reasonable Doubt, Their Eligibility for Recognized Constitutional Protections.

This Court's cases have emphasized "historical practice," *Cooper*, 517 U.S. at 356, as a guidepost in determining the requirements of due process. Since the precise question in *Atkins* cases lacks direct lineal antecedents in early American and English legal history, the historical inquiry must be somewhat different than the *Cooper* analysis.[7] But the gen-

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[6] *Leland v. Oregon*, 343 U.S. 790 (1952), is not to the contrary. In that case, the Court clearly noted the distinction between constitutional rights and discretionary state policies: "Nor is this a case in which it is sought to enforce against the states *a right which we have held* to be secured to defendants in federal courts by the Bill of Rights." *Id.* at 798 (emphasis added). While *amici* express no view as to whether, in some future case, the Court should address the constitutional status of the insanity defense, it is absolutely clear that no case had recognized such a right at the time of *Leland*, clearly distinguishing that case from the case at bar. *See generally Medina*, 505 U.S. at 449; *Foucha v. Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring in part and concurring in the judgment); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting).

[7] As this Court has observed, there is some parallel for a subset of defendants with mental retardation to the historical prohibition against punishing "idiots." *Penry*, 492 U.S. at 332-33. But since this represented a preclusion of *any* punishment, and not just the death penalty (although,

eral history of the development of the beyond a reasonable doubt standard is, nonetheless, illuminating.

The reasonable doubt standard was developed to quantify the level of evidence required of the prosecution in criminal trials. As this Court observed, "its crystallization into [its current formula] seems to have occurred as late as 1798." *In re Winship*, 397 U.S. 358, 361 (1970).[8] *See generally Victor v. Nebraska*, 511 U.S. 1, 10-13 (1994). The purpose of placing so heavy a burden on the prosecution was to implement the maxim that it is preferable for multiple guilty

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admittedly, the death penalty was far more pervasive in earlier centuries), the analogy regarding the burden of persuasion is somewhat more attenuated here than it was in *Cooper*.

[8] More recent historical scholarship, while providing greater detail, confirms this general observation. *See, e.g.*, Thomas Andrew Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 286 (1985); Barbara J. Shapiro, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 1-41 (1991); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975); Barbara J. Shapiro, *"To A Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153 (1986). *See generally* Barbara J. Shapiro, A CULTURE OF FACT: ENGLAND, 1550-1720, at 8-33 (2000); Steve Sheppard, *The Metamorphosis of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1183-1204 (2003). Indeed, an even earlier instance of the formulation is found in Robert Treat Paine's argument for the Crown in the Boston Massacre trial of 1770: "[I]f there-for in the examination of this Cause the Evidence is not sufficient to Convince beyond reasonable Doubt of the Guilt of all or any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond reasonable Doubt the Justice of the Law will require you to declare them Guilty and the Benignity of the Law will be satisfyed in the fairness and impartiality of their Tryal." 3 LEGAL PAPERS OF JOHN ADAMS 271 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

defendants to be acquitted, rather than for one innocent defendant to be convicted.[9]

The highly elevated level of certainty demanded by the reasonable doubt standard was the principal reason for resistance, as early as the nineteenth century, to extending it to civil cases or to placing it on parties other than prosecutors.[10] With very few exceptions, that resistance continues to the present day.

B. Contemporary Practice in the States Rejects Imposing the Reasonable Doubt Burden on Criminal Defendants.

After more than two centuries of its use as a standard for prosecutorial proof, the reasonable doubt standard is seldom placed on any party other than the State in a criminal proceeding. There are few instances in modern criminal law when defendants are *ever* required to bear a burden of persuasion above preponderance of the evidence,[11] and none of these involves recognized federal constitutional rights.

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[9] *See* J.W. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 653-54 (1876) (discussing the relationship of the evidentiary standard to variations on the maxim from Hale to Blackstone).

[10] *See* 1 Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE 158-60 (16th ed., revised, enlarged, and annotated by John Henry Wigmore, 1899).

[11] A few States may require defendants to meet the clear and convincing evidence standard when offering certain affirmative defenses, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-206(B) (West 2001) (entrapment), but *amici* are unaware of state laws requiring defendants to bear a reasonable doubt burden in such circumstances. *See generally* Annotation, *Burden of Proof as to Entrapment Defense—State Cases*, 52 A.L.R.4th 775 (1987). Federal law and several States require defendants to bear a clear and convincing evidence burden for the insanity defense, *see, e.g.*, 18 U.S.C. § 17 (2000); TENN. CODE ANN. § 39-11-501 (2003). However, despite the constitutional latitude afforded by *Leland*, it appears that few, if any,

More directly relevant, of course, is that *no other State's legislature*, either before or after *Atkins*, has chosen to place a reasonable doubt burden of demonstrating mental retardation on a capital defendant. Similarly, no court in any other State, in devising procedures to implement *Atkins*, has imposed a reasonable doubt burden on defendants seeking to demonstrate that they have mental retardation.[12] Indeed *the Georgia Supreme Court itself*, in prescribing procedures for post-conviction mental retardation capital cases, places the burden of persuasion on the defendant by *a preponderance of the evidence.*[13]

Thus, it is clear that the novel and unique[14] Georgia requirement that defendants prove their own mental retardation

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States currently require defendants to prove insanity at the reasonable doubt level. *See* 4 Michael L. Perlin, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 183 (2d ed. 2002). Oregon abandoned the reasonable doubt standard within five years of this Court's decision in *Leland*. 1957 OR. LAWS 380.

[12] *See, e.g., Murphy v. State*, 54 P.3d 556, 568 n.20 (Okla. Crim. App. 2002). *See also id.* at 573 n.7 (Chapel, J., concurring in result).

[13] *Fleming v. Zant*, 386 S.E.2d 339, 342-43 (Ga. 1989) (interpreting state constitution's prohibition on "cruel and unusual punishment"). *Amici* find the Georgia Supreme Court's attempt to explain this paradox extraordinarily unpersuasive. *See Burgess v. State*, 450 S.E.2d 680, 694-95 (Ga. 1994).

[14] As the first State to enact a statute prohibiting the execution of defendants with mental retardation, *see Atkins*, 536 U.S. at 313-14, Georgia's legislature lacked the benefit of statutory models from other States. Georgia chose to graft the prohibition onto its existing statutory provision for a "Guilty But Mentally Ill" verdict. *See generally* Bradley D. McGraw *et al.*, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117 (1985); Henry J. Steadman *et al.*, BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 102-120 (1993) (Chapter 7: The Impact of Adopting a Guilty but Mentally Ill Verdict in Georgia).

Because Georgia's protection of defendants with mental retardation was framed in the form of a verdict of *guilty*, *see* GA. CODE ANN. § 17-7-

beyond a reasonable doubt can find no support in "contemporary practice." *See Cooper*, 517 U.S. at 360.[15]

C. Standards of Fundamental Fairness Prohibit States from Requiring Capital Defendants to Prove Their Eligibility for *Atkins* Protection Beyond a Reasonable Doubt.

This Court held in *Cooper* that, in addition to surveying historical precedents and contemporary practices, the Court may also independently evaluate the fundamental fairness of a procedural burden imposed upon defendants. 517 U.S. at 362. *See also Medina*, 505 U.S. at 454 (O'Connor, J., concurring in the judgment). Such an evaluation in this case yields dramatic and disturbing results.

The essence of the Georgia burden is that defendants who have mental retardation, and who are, therefore, entitled to protection from the death penalty under *Atkins*, will have their claims rejected unless they can prove beyond a reasonable doubt that their disability meets the definition of mental retardation. As a result, if the evidence of mental retardation presented by the defendant persuades the jury by a preponderance of the evidence, *the defendant will still be sentenced to death.* Indeed, if the defense persuades the jury of the

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131(c)(3) (1997), and since guilty verdicts are traditionally associated with the reasonable doubt standard, it is certainly conceivable that there may have been some confusion at the time of enactment about the appropriate burden for the statute.

It is noteworthy that while more than two dozen States have followed Georgia's substantive lead (both before *Atkins* and since) in protecting defendants with mental retardation, *none* has modeled its enactment on Georgia's statute, as to either the verdict form or the burden of proof.

[15] "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining" whether a right is fundamental. *Leland*, 343 U.S. at 798.

defendant's mental retardation, even at the level of clear and convincing evidence, the defendant will still be sentenced to death.

Thus, the likelihood that a defendant who has mental retardation will be sentenced to death is not limited to "a narrow class of cases where the evidence is in equipoise," in which it is equally likely that the defendant does or does not have mental retardation. *See Medina*, 505 U.S. at 449. Rather, there is a very substantial likelihood, *indeed almost a certainty*, that over time, Georgia will execute an individual who has mental retardation, but who has failed to persuade the jury of that fact beyond a reasonable doubt. Such a result cannot be squared with this Court's teachings regarding the Eighth Amendment and the Due Process Clause.

Both the definition of mental retardation and the nature of clinical evaluation and testimony are consistent with this conclusion. Mental retardation, unlike mental illness, has an objectively measurable disability at its core, *i.e.*, the impairment of cognitive functioning that is identifiable through IQ testing. But in interpreting those psychometric measurements (particularly where the individual may have a score near the boundary of the definition), and even more crucially, in evaluating the impairments in adaptive functioning that the definition also requires,[16] professional clinical judgment will be an essential part of the assessment.[17] And, just as the

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[16] The Georgia statute's definition, which *amici* believe is constitutionally acceptable, describes this requirement in terms of "impairments in adaptive behavior." GA. CODE ANN. § 17-7-131(a)(3) (1997). Some other States' formulations of the definition, describing the same adaptive requirement, use somewhat different terminology. *See Legislative Guide*, *supra* note 4, at 12-14.

[17] *See generally* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 93-96 (10th ed. 2002); American Psychological Association, MANUAL OF DIAGNOSIS AND PROFESSIONAL

Court has noted with regard to the government's burden in civil commitment cases, a "serious question" exists as to whether any defendant could ever prove mental retardation beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 429 (1979).[18]

As the Court observed in *Atkins*, not every defendant who claims to have mental retardation "will be so impaired as to fall within" the definition. 536 U.S. at 317. State courts will have the task of adjudicating individual claims that a defendant is entitled to *Atkins* protection. Georgia now insists[19] that these individuals should be executed if their proof of

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PRACTICE IN MENTAL RETARDATION 113-198 (John W. Jacobson & James A. Mulick eds., 1996).

[18] Regarding mental illness, the *Addington* Court also observed that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." 441 U.S. at 430. As noted above, diagnosis of mental retardation includes more objective indicia than is the case with mental illness. But the Court's observations about the unsuitability of the reasonable doubt standard are equally apposite, particularly when, as in the Georgia statute, the burden is placed, *not on the State*, but rather on *the individual* with the disability.

Persuading a jury of the defendant's mental retardation beyond a reasonable doubt was even more difficult in the instant case when the prosecution produced, as an expert, a witness who offered a "guesstimate" that the defendant's IQ is outside the range of mental retardation. *See* Petition Appendix at 32a. Particularly if a defendant does not have visibly identifiable physical characteristics—such as the facial features associated with Down syndrome—jurors might well conclude that such testimony *alone* constitutes reasonable doubt.

[19] *Amici* do not suggest that it was the original intention of the Georgia legislature to thwart the legal protection of individuals with mental retardation. *See supra* note 14.

mental retardation "only" rises to the preponderance or clear and convincing level. This insistence undermines *Atkins*, and for some defendants with mental retardation, undermines it fatally.

Viewed in light of the competing interests of the individual defendants and the State,[20] the imbalance comes into even clearer focus. The defendant's interest is not only in life, obviously the highest possible interest,[21] but also in the right of fair access to an Eighth Amendment protection recognized by this Court. What is the State's interest in imposing the reasonable doubt burden on capital defendants and thereby executing defendants who have mental retardation but cannot meet the elevated standard of proof? The State's brief in opposition articulates none. And the Georgia Supreme Court's rationale can be fairly paraphrased as, "the U.S. Supreme Court has not yet prohibited it."[22]

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[20] "[A]n examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof." *Santosky*, 455 U.S. at 787 (Rehnquist, J., dissenting). In *Cooper*, this Court found a heightened burden on a defendant unnecessary to "vindicate the State's interest in prompt and orderly disposition of criminal cases." 517 U.S. at 360.

[21] Compare *Santosky*, where the Court observed that "[f]ew forms of state action are both so severe and so irreversible [as the termination of parental rights]." 455 U.S. at 759.

[22] *See Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003). What *amici* find most remarkable is not that the state court had reached a similar conclusion in 1997, *see Mosher v. State*, 491 S.E.2d 348 (Ga. 1997), but rather that it failed to perform even the most rudimentary due process analysis in 2003, *after* this Court had recognized defendants' Eighth Amendment interest in *Atkins*. Simply observing that there may be disagreements in individual cases about "determining which offenders are in fact retarded," *Head*, 587 S.E.2d at 622 (quoting *Atkins*, 536 U.S. at 317), does not amount to a constitutional analysis of which party should bear the risk of an erroneous determination.

D. This Court's Cases Regarding Due Process and Burdens of Persuasion Provide No Support for Georgia's Procedure.

This Court has considered the application of due process principles to burdens of persuasion in a variety of legal contexts. Its decisions offer no support for Georgia's imposition of a reasonable doubt burden in *Atkins* cases.

As the Court has noted, "adopting a standard of proof is more than an empty semantic exercise. In cases involving individual rights, whether criminal or civil, the standard of proof [at a minimum] reflects the value society places on individual liberty." *Addington*, 441 U.S. at 425 (internal quotations and citations omitted). And the importance of the standard of proof is practical as well as symbolic, since "a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring). The level of the burden imposed on a party reflects not only "the importance of a particular adjudication, it also serves as a societal judgment about how the risk of error should be distributed between the litigants. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (internal citations and quotations omitted).

This risk, of course, matters most in factually close cases. *Cooper*, 517 U.S. at 366-67; *Santosky*, 455 U.S. at 764. In such cases, the constitutional issue is whether the burden the State has chosen "fairly allocates the risk of an erroneous factfinding between these two parties." *Santosky*, 455 U.S. at 761. When, as in the case at bar, the individual interest is at the highest level, "the social cost of even occasional error is sizable." *Id.* at 764. *See generally Cruzan*, 497 U.S. at 283

("An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.").

Georgia imposes on defendants with mental retardation "a markedly asymmetrical evidentiary burden," *see id.* at 316 (Brennan, J., dissenting), erecting an obstacle to even-handed evaluation of their claim to protection from capital punishment under *Atkins*. It does so offering no justification, other than the implicit rationale that the State prefers to impose the death penalty.

CONCLUSION

In order to preclude more death sentences under this patently unconstitutional standard, *amici* respectfully request that the Court grant the petition and issue the writ.

Respectfully submitted,

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